

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 3884

IN THE MATTER OF:

Served February 11, 1992

Application of MALEK INVESTMENT,)
INC., Trading as MONTGOMERY AIRPORT)
SHUTTLE for Temporary Authority --)
Irregular Route Operations)

Case No. AP-91-44

By application accepted for filing December 19, 1991,¹ Malek Investment, Inc., trading as Montgomery Airport Shuttle (MAS or applicant), a Maryland corporation, seeks temporary authority to transport passengers, together with baggage in the same vehicles as passengers, in irregular route operations from points in Montgomery County, MD, on the one hand, to Washington National Airport (National) and Washington Dulles International Airport (Dulles), on the other, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

MAS proposes to conduct operations using three owned vehicles with a manufacturer-designed seating capacity of less than 16 passengers each. MAS would provide regularly scheduled service from specified hotels in Montgomery County, MD, to National and Dulles airports at one-way fares of \$17 and \$19, respectively. Children under six would ride without extra charge.

We served notice of this application in Order No. 3869,² and therein set a protest deadline of January 8, 1992. Action Taxi, Inc. (Action Taxi), and Executive Coach, Ltd. (Executive Coach), each filed protests on January 8, 1992. Executive Coach simultaneously filed a request for hearing. Each protestant alleges a lack of need for, and present availability of, service. Each protestant also challenges MAS's regulatory compliance fitness. Action Taxi further challenges MAS's operational fitness. Finally, Executive Coach questions MAS's financial fitness and the control relationships among MAS, Montgomery County Taxi, and Malek, Inc.

MAS filed two pleadings on January 24, 1992, nominally designated responses but in essence replies. One reply addresses Action Taxi's protest, the other Executive Coach's protest. Each reply was served on the corresponding protestant only.

¹ See Action Taxi v. Malek Investment, FC-91-01, Order No. 3867 (Dec. 19, 1991).

² In re Application of Malek Investment, AP-91-44, Order No. 3869 (Dec. 23, 1991).

I. DISCUSSION

Action Taxi's timely protest is accepted for filing. Executive Coach's protest is rejected for lack of substantial interest. MAS's untimely and deficiently served replies are rejected. MAS's application is granted.

A. The Protestants' Statements of Substantial Interest

Order No. 3869 provided that "any person desiring to protest this application shall file a protest in accordance with Commission Rule No. 13" Commission Rule No. 13-01 provides in pertinent part that "[a] protest may be filed against the granting of any application . . . by any person having a substantial interest therein." Rule No. 13-02 provides in pertinent part that "[e]ach protest shall contain a concise statement clearly setting forth the substantial interest of the protestant in the proceeding."

Action Taxi's protest contains the following statement:

MAS proposes to operate a transportation service from hotels in Montgomery County, Md. to Washington National Airport and Dulles International Airport. Action Taxi is a licensed taxicab company in Montgomery County that presently provides this same service set at rates determined by the Department of Transportation of Montgomery County, Maryland.

We accept this as a statement of substantial interest.

With regard to Executive Coach's substantial interest, it states:

EXECUTIVE COACH, LTD., is a Certificated Carrier in the business of providing irregular route transportation within the Metropolitan District. The Protestant is a related entity to Barwood, Inc., a provider of taxicab and related transportation services within Montgomery County, Maryland. The proposed service of the Applicant will directly impact upon the operations of Barwood, Inc.

The Commission does not accept this as a statement of substantial interest for Executive Coach.³ It only would represent a statement of substantial interest if asserted by Barwood, Inc. A protestant may not assert the interest of another as grounds for standing. Executive Coach's protest, therefore, is rejected.⁴

³ Indeed, we note that Executive Coach does not presently have on file with the Commission a tariff which would permit it to provide the service MAS proposes.

⁴ Executive Coach, in any event, interjects only two grounds for protest that Action Taxi does not: staleness of financial information and inadequate description of control relationships. Regarding the alleged staleness, Executive Coach's attention is directed to the financial statements dated March 31, 1991, and June 30, 1991, supplementing forms E and F. As for MAS's alleged inadequate description of control relationships, the Commission takes

B. MAS's Untimely and Deficiently Served Replies

Commission Regulation No. 54-04(d) mandates that any reply an applicant chooses to lodge against a protest must be filed within seven days after the date the protest is served, when, as here, the protest is served on the replying party by mail. Intervening Saturdays, Sundays and holidays are not included in the calculation of when the seven days has run.⁵ One protest was served on January 6, 1992, and the other on January 8, 1992. Replies, therefore, were due no later than January 15, 1992, and January 17, 1992, respectively. MAS filed its replies on January 24. In addition, Commission Rule No. 4-07 requires that pleadings be served on all parties of record. There are two protestants in this proceeding. Each reply, however, was served on only the protestant against which it was interposed. Accordingly, MAS's replies are rejected.

C. The Immediate Need For Regularly Scheduled Airport Service

This application is governed by the Compact, Title II, Article XI, § 13(a), which provides:

When the Commission finds that there is an immediate need for service that is not available, the Commission may grant temporary authority for that service without a hearing or other proceeding up to a maximum of 180 consecutive days, unless suspended or revoked for good cause.

Action Taxi argues that "MAS has failed to demonstrate an immediate and urgent need" for service, citing Order No. 2857.⁶ That order is wholly inapposite. The standard and factual record here are distinctly different. The standard here is "immediate need" not "immediate and urgent need."⁷ Moreover, as the Commission noted in that order, the applicant there had submitted evidence on this issue on three separate occasions.⁸ The evidence in the first two

official notice of the fact that Montgomery County Taxi is another trade name for Malek Investment, Inc. The description of the applicant's relationship with Montgomery County Taxi is adequate. The sworn statement in the application under "Control Relationships" evidences that Malek, Inc., -- the existence of which is disclosed in the Certificate of Self Insurance supplementing the application -- is not a carrier.

⁵ Commission Rule No. 7-01.

⁶ In re Application of All About Town, No. AP-86-12, Order No. 2857 (May 12, 1986). Executive Coach makes a similar argument in its rejected protest along the lines that the failure of the previous shuttle operator (Washington Flyer) demonstrates inadequacy of demand. While this does not necessarily follow, it suffices to say inadequate demand does not equate with no demand or, more to the point, no immediate demand.

⁷ The standard changed when the Compact was amended, effective February 1, 1991. Compare Compact, Pub. L. No. 101-505, 104 Stat. 1300, Title II, Art. XI, § 13(a) (1990) with Compact, Pub. L. No. 86-794, 74 Stat. 1031, Title II, Art. XII, § 4(d) (3) (1960).

⁸ Order No. 2857 at 3.

submissions was inadmissible,⁹ and the third submission did not contain any indication that whatever need existed was immediate and urgent.¹⁰ Here, there is no question concerning the admissibility of MAS's evidence. That evidence clearly demonstrates an immediate need for regularly scheduled airport service.

MAS has introduced affidavits from managers of three hotels it proposes to serve. The affidavits establish that the Washington Flyer until recently had provided regularly scheduled airport service from these hotels, that hotel guests had been using the service but that the service had been discontinued. These affidavits are evidence that guests of these hotels have an immediate need for the proposed service.

D. The Unavailability of Regularly Scheduled Airport Service

As noted above, the Commission must find that the service MAS proposes to offer is presently unavailable. Action Taxi contends that this service is presently provided by taxicab and limousine companies. The record does not support this contention.

MAS proposes to offer the same type of service that the Washington Flyer had offered: regularly scheduled, fixed termini, flat fare, airport service. There is nothing in the record establishing that taxicab and limousine companies are presently providing this service. We have only Action Taxi's conclusory allegation, which does not constitute probative evidence on this issue.¹¹ Moreover, as Action Taxi points out, what it really offers is taxicab service. MAS is not proposing to offer bona fide taxicab service.¹² If it were, it would not need temporary authority from us in the first place.¹³ Conversely, if any taxicab or limousine company is providing fixed termini, regularly scheduled service it must have a Certificate of Authority.¹⁴ The affidavits of the three hotel managers, discussed above, is evidence that the service is not currently available. The lack of a protest from any certificated carrier having a legitimate interest in this proceeding¹⁵ is further evidence that the service MAS proposes offering is presently unavailable.¹⁶

⁹ Id. at 3.

¹⁰ Id. at 4.

¹¹ In re Application of Miju Express, No. AP-91-35, Order No. 3855 at 2 (Dec. 3, 1991). Executive Coach's rejected protest is similarly devoid of any objective factual details concerning the service that purportedly is available.

¹² See Commission Regulation No. 51-09.

¹³ Compact, Title II, Article XI, § 1(b).

¹⁴ Montgomery Charter Serv. v. WMATC, 325 F.2d 230 (D.C. Cir. 1963).

¹⁵ See supra, n.3 and accompanying text.

¹⁶ In re Application of Wheelchair Express, No. AP-91-28, Order No. 3834 (Oct. 23, 1991).

E. MAS's Fitness

A temporary applicant must also demonstrate its fitness.¹⁷ Action Taxi challenges MAS's operational fitness and its regulatory compliance fitness. We find MAS operationally fit and fit as to prospective regulatory compliance.

1. MAS's Operational Fitness

Action Taxi argues that MAS has not shown sufficient revenue vehicles to support its proposed operations, citing Order No. 2864.¹⁸ That order granted the applicant in that case temporary authority. Hence, it does not support denial of temporary authority here.

MAS's application lists three revenue vehicles. Action Taxi claims that:

The schedule of service offered by MAS (see copy attached from Formal Complaint FC-91-01), promises hourly service at five (5) hotels to two (2) destinations, National and Dulles Airports from 5:30 a.m. - 8:30 p.m. Logistically this would require a bare minimum of four (4) vehicles. MAS offers only two vehicles in [its] application that can operate without violating Montgomery County Regulations.

The third vehicle, according to Action Taxi's evidence, is currently licensed by Montgomery County as a taxicab.

Action Taxi's argument might have some merit if the schedule filed with MAS's application¹⁹ promised hourly service to each of two destinations. It appears that it does not. MAS's schedule says that the "EXPRESS SHUTTLE" operates every other hour to National and Dulles airports from certain listed hotels and that vehicles depart hourly. While MAS's schedule is not a model of clarity, it would appear that shuttle departures are staggered, so that one shuttle departs for National this hour, Dulles the next. Given this reading of its schedule and a travel time to each airport of approximately two hours round trip, MAS conceivably could conduct this operation with only two vehicles.²⁰

We therefore find that MAS has sustained its burden of proving operational fitness. We will, however, require MAS to clarify its schedule so as to avoid any possible confusion on the part of potential passengers concerning departure times for a given airport.

MAS is cautioned against conducting certificated operations in taxicabs. It is a violation of our requirements for a carrier to

¹⁷ Id.

¹⁸ In re Application of O&R Management Corp., No. AP-86-16, Order No. 2864 (May 23, 1986).

¹⁹ This is the same schedule attached to Action Taxi's protest.

²⁰ This comports with MAS's rejected reply to Action Taxi's protest.

transport passengers in a taxicab over state lines in the Metropolitan District without charging those passengers in accordance with the rates and charges prescribed by this Commission.²¹ Likewise, it is a violation of the Compact and our regulations for a carrier to charge a rate or fare for certificated operations other than the rate or fare specified in its tariff.²²

2. MAS's Regulatory Compliance Fitness

Action Taxi argues that MAS has failed to demonstrate compliance with the Commission's insurance requirements in Commission Regulation No. 58.²³ This is not a defect in MAS's application. An applicant is not required to be in compliance with Regulation No. 58 at the time it files its application. MAS will be directed to comply with Commission Regulation No. 58 before commencing operations.

Action Taxi also argues that MAS is an unfit carrier due to past violations of the Compact, citing Order No. 3857.²⁴ We found in that order that MAS had knowingly and willfully violated the Compact by operating without a Certificate of Authority.²⁵ Action Taxi quotes from that order where we state this raises the presumption that MAS is unfit to receive a grant of authority "because it is unable or unwilling to conform to the provisions of the Compact."²⁶ What Action Taxi does not recognize is that this presumption is rebuttable. "[P]rior unauthorized operations by an applicant are not, as a matter of law, a bar to a grant of the requested authority."²⁷ "Determination of compliance fitness is prospective in nature."²⁸

The extent of MAS's prior unauthorized operations is vague. Our finding of MAS's knowing and willful violation of the Compact rested on MAS's failure to answer Action Taxi's complaint, which by operation of law constituted an admission by MAS to the matters

²¹ In re Investigation of Interstate Taxicab Rates, No. MP-87-15, Order No. 3058 (Aug. 17, 1987).

²² Compact, Title II, Article XI, § 14(c); Commission Regulation No. 55-02.

²³ Executive Coach voices a similar concern in its rejected protest.

²⁴ Action Taxi v. Malek Investment, No. FC-91-01, Order No. 3857 (Dec. 3, 1991). Executive Coach, in its rejected protest, similarly points to the statement in MAS's application that MAS has been the subject of a compliance fitness investigation or proceeding. As MAS discloses in its application transmittal letter, it is referring to the aforementioned formal complaint proceeding initiated by Action Taxi before this Commission. This agrees with MAS's rejected reply to Executive Coach's rejected protest.

²⁵ We also found MAS in violation of the Compact's insurance and tariff requirements. All three offenses may be classified as unauthorized operations.

²⁶ Action Taxi's Protest at 2 (quoting from Order No. 3857 at 3).

²⁷ Crete Carrier Corp. v. United States, 577 F.2d 49, 51 (8th Cir. 1978).

²⁸ In re Application of Miju Express, No. AP-91-36, Order No. 3865 at 3 (Dec. 19, 1991).

alleged therein.²⁹ Action Taxi's complaint alleges in its statement of facts that MAS began operations on September 16, 1991.³⁰ There is no indication in the complaint, however, of the number of trips conducted or passengers carried between that date and October 30, 1991, the date of the complaint. We are informed here of only two incidents. They are alleged in an affidavit attached to Action Taxi's protest.

On December 3, 1991, we ordered MAS to cease and desist all operations in violation of the Compact and to file a compliance report within fifteen days.³¹ Three days later on December 6, 1991, MAS's president filed an affidavit admitting that MAS had previously operated without a Certificate of Authority and acknowledging it was wrong to do so but averring that, notwithstanding MAS's earlier deemed admission by failure to answer, MAS was unaware at the time it was operating that it needed this authority and that once MAS was informed of this need it shut down its operations.³²

We think it significant that MAS has acknowledged its previous wrongful actions and discontinued operating without authority and that MAS promptly tendered its compliance report when ordered to do so. We regard this as a sincere effort to correct past errors. It exhibits MAS's willingness to comply with the Compact and Commission regulations in the future. We, therefore, find that MAS has established its prospective compliance fitness.

II. CONCLUSION

MAS has introduced evidence of its fitness and of an immediate need for, and unavailability of, service. With the sole exception of the challenge to MAS's compliance fitness, we find Action Taxi's arguments not well founded. As for compliance fitness, MAS's recognition of error, correction of error and overall compliance with Order No. 3857 establishes its willingness to comply with the Compact and our regulations in the future. Finding an immediate need for, and unavailability of, the service MAS proposes to offer and is fit to provide, we grant MAS's application for temporary authority.

THEREFORE, IT IS ORDERED:

1. That Malek Investment, Inc., trading as Montgomery Airport Shuttle, is hereby conditionally granted a maximum of 180 days temporary authority, contingent upon timely compliance with the terms of this order, to transport passengers, together with baggage in the same vehicles as passengers, in irregular route operations from points in Montgomery County, MD, on the one hand, to Washington National

²⁹ Order No. 3857 at 2 (citing Commission Rule No. 12).

³⁰ Complaint at 2 (incorporated herein by reference; see Commission Rule No. 22-05).

³¹ Order No. 3857.

³² The affidavit of MAS's president is incorporated herein by reference. Commission Rule No. 22-05.

Airport and Washington Dulles International Airport, on the other, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

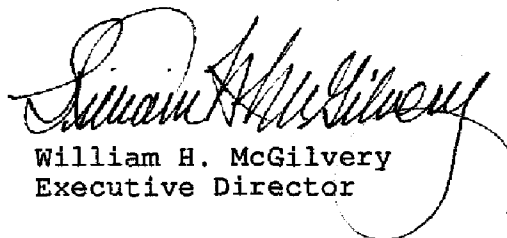
2. That Malek Investment, Inc., trading as Montgomery Airport Shuttle, is hereby directed to comply with the following requirements within 30 days from the date of this order: (a) identify its vehicles in accordance with Commission Regulation No. 61; (b) file a notarized affidavit of compliance with Commission Regulation No. 61; (c) file four copies of its WMATC Temporary Tariff No. AP-91-44; (d) file an equipment list stating year, make, model, serial number, vehicle number (if any), seating capacity and license plate number (with jurisdiction) for all vehicles to be used in the proposed service; (e) file evidence of ownership, and, if any vehicles are owned by an entity other than Malek Investment, Inc., trading as Montgomery Airport Shuttle, lease(s), as appropriate, for all vehicles to be used in the proposed service; (f) file a certificate of insurance in conformance with Commission Regulation No. 58 and Order No. 3623 covering all vehicles to be used in the proposed service; and (g) file four copies of a schedule in accordance with Commission Regulation No. 57, clearly setting forth departure times from each hotel to each airport.

3. That the Executive Director shall notify Malek Investment, Inc., trading as Montgomery Airport Shuttle, in writing, upon its timely compliance with the requirements of this order, that it may commence operations pursuant to temporary authority.

4. That the temporary authority granted herein shall expire Sunday, August 9, 1992, unless otherwise ordered by the Commission.

5. That unless Malek Investment, Inc., trading as Montgomery Airport Shuttle, complies with the requirements of this order within 30 days from date of issuance or such additional time as the Commission may direct or allow, the grant of authority contained herein shall be void, and this application shall stand denied in its entirety effective upon the expiration of said compliance time.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS DAVENPORT, SCHIFTER, AND SHANNON:



William H. McGilvery
Executive Director